



Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

SHAUNA RUSSELL SHIELDS
ASSISTANT ATTORNEY GENERAL

October 20, 2005

ADDRESS REPLY TO:
ADMINISTRATIVE LAW DIVISION
HOOVER STATE OFFICE BUILDING
1300 E. WALNUT
DES MOINES, IOWA 50319
PHONE (515) 281-4014

ATTORNEY GENERAL'S OFFICE POSITION PAPER ON THE MODEL PROCUREMENT CODE

To: Members of the Government Oversight Committee

In response to your request for position papers on the Model Procurement Code ("the Model Code"), several of the contracting attorneys in the Attorney General's Office have reviewed the Model Procurement Code to determine whether we think it advisable for the State of Iowa to adopt the Model Code for use in Iowa. The general consensus among those of us who devote significant portions of our practice to state contracting is that the Model Code would add unnecessary layers of costly bureaucracy onto the State's procurement process. The Model Code contemplates a procurement policy office, a chief procurement officer, a procurement advisory council, a procurement institute and a procurement appeals board. Not only would each of these layers increase the cost of procurements and slow down the process, but they would result in more litigation or significantly higher expenditures of state resources creating unnecessary bureaucratic machinery. For example, a procurement appeals board would likely be idle much of the time. The State currently only has a handful of vendor appeals each year.

The Model Code was drafted largely by private practice attorneys, and the perspective seems to favor private interests rather than public interests. In addition, the Model Code deals largely with the purchase of goods (including construction projects), rather than the purchase of services. It does not appear that the drafters of the Model Code contemplate the purchase of other services, such as social services.

We also note that the Model Code should not be confused with a uniform act, which is simpler to adopt without much change. The Model Code offers alternative options in every section that require decisions to be made as to which structure or format the State chooses. And the Model Code contains very little in the way of specifics. Much of the "heavy lifting" of implementing the Model Code would actually be done by administrative rules implementing the Model Code. In reality, Iowa law already addresses much of what the Model Code attempts to address. Rather than adopting a "model" for something that has already been addressed, a far better suggestion

would be to organize all Iowa laws addressing procurement into a central location in the Iowa Code, and then only address those provisions of the Model Code that have not already been addressed in Iowa law. In addition, the State's contracting process would benefit from improving training opportunities and focusing training efforts on a narrower number of state employees who engage in procurement on behalf of the State.

There are several specific provisions of the Model Code that we believe would require attention if the legislature decided to pursue adopting a form of the Model Code. These provisions include, but are not limited to, the following:

- Section 2-102: This provision clearly vests all purchasing power in a single purchasing entity. To adopt this idea, the legislature would need to revoke the independent purchasing authority of a number of agencies or add a layer of bureaucracy and oversight above those agencies with independent purchasing authority.
- Section 3-202 & 3-203: These provisions appear to take the position that sealed bids are the preferable method of seeking competition. An RFP is only permissible after the Purchasing Agency finds "that the use of a competitive sealed bidding is either not practicable or not advantageous to the State." There are many instances where an RFP would be a preferred method of competition, and it seems unnecessary to require the purchasing agency to jump through additional hoops before choosing to use that method.
- Section 3-401(2) is inconsistent with Iowa's Open Records Law because it gives the bidder sole discretion to declare what is confidential information and prohibits release of that information without the written consent of the bidder.
- Section 9-402, the Appeals section, creates a lot of process that would add substantial time and uncertainty to the award process. As it is written, an aggrieved party would have 14 days to file a protest from the date it knew *or should have known* of facts giving rise to the protest. There would be an automatic stay of the contract award unless the chief procurement officer issues a written decision that continuation of the process was necessary to protect the substantial interests of the State. And if the protesting bidder prevails, it is entitled to its reasonable costs in preparing the bid – which could be a substantial amount if time is included as an element of cost. All of these provisions are substantially different than current Iowa law. Further, this method would certainly give bidders significant incentive to appeal and slow down the State's procurement process.
- Section 11-301: This section includes a provision that requires the procurement officer to comply with federal law and "authorized regulations which are mandatorily applicable" and not reflected in the Model Procurement Code. It is unclear what an "authorized" regulation is. It is not uncommon for the federal government to place demands on state governments, but there is no federal law or regulation specifically addressing the issue. The language of 11-301 would potentially prohibit the State from accommodating the federal government's demands of this type.

Finally, any changes the Legislature chooses to make in the procurement arena should be supported by adequate resources. These resources must include a sufficient number of qualified, well-trained staff who have appropriate legal assistance available to them at both the policy-making and implementation stages of the process.

Sincerely,

Shauna Russell Shields
Assistant Attorney General
Iowa Department of Justice
Administrative Law Division